



OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

Washington, DC 20528 / www.oig.dhs.gov

WHISTLEBLOWER RETALIATION REPORT OF INVESTIGATION

<i>Case Number:</i>	W17-USCG-WPU-16018
<i>Complainant:</i>	[REDACTED] Lieutenant Commander U.S. Coast Guard, New London, Connecticut
<i>Investigation Under:</i>	10 U.S.C. § 1034 (“Military Whistleblower Protection Act”)

I. BACKGROUND AND SUMMARY

The Department of Homeland Security (“DHS”), Office of Inspector General (“OIG”) conducted this investigation in response to a complaint made by [REDACTED] (“Complainant”), a Lieutenant Commander in the United States Coast Guard (“U.S. Coast Guard”), stationed at the U.S. Coast Guard Academy (“Academy”)¹ in New London, Connecticut, alleging that:

- (1) Complainant received a negative Officer Evaluation Report (“OER”) after making discrimination and harassment complaints against her superiors;
- (2) The U.S. Coast Guard failed to respond to the discrimination and harassment experienced by Complainant; and
- (3) The U.S. Coast Guard subjected Complainant to additional harassment and retaliatory actions after filing the complaints.

DHS OIG’s investigation substantiated Complainant’s claim that she was retaliated against on the basis of her complaints, in violation of the Military Whistleblower Protection Act (“MWPA”), 10 U.S.C. § 1034. Specifically, a preponderance of the evidence established that her complaints were a contributing factor in the numerical marks in her OER for the period ending May 31, 2016. The totality of the evidence demonstrated that Complainant would have received higher marks absent her complaints. DHS OIG thus recommends that the Secretary order corrective action with regard to Complainant’s OER.

¹ The Academy is the service academy of the U.S. Coast Guard and is an accredited institute of higher education.



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DHS OIG's investigation also revealed issues with how [REDACTED] ("Academy Official2"), and [REDACTED] ("Academy Official1"), handled the complaints filed by Complainant in 2016. Specifically, DHS OIG found that Academy Official1 ordered a preliminary inquiry, which resulted in a recommendation for a full administrative investigation of Complainant's allegations conducted by someone with equal employment opportunity or civil rights credentials. Notwithstanding this recommendation, Academy Official1 and Academy Official2 instead ordered a general climate and culture investigation, which was a relatively superficial effort and did not address Complainant's particular situation. Moreover, Academy Official2 conveyed incomplete and/or misleading information regarding the outcome of the preliminary inquiry to Complainant and her colleagues, likely exacerbating the situation.

The investigation also revealed potential disparities in how the U.S. Coast Guard responded to Complainant's bullying complaint compared to a later bullying complaint from a different member of the Academy. DHS OIG could not determine whether the handling of the two complaints was consistent, in part because there is no requirement that commanders document their decision-making in writing. DHS OIG recommends that the U.S. Coast Guard bullying and harassment complaint process include requirements for commanding officers to document in writing the reasons for their findings and outcomes in response to bullying and harassment complaints. DHS OIG also recommends additional training for all supervisors relating to the U.S. Coast Guard's bullying, harassment, and discrimination policies.

II. SCOPE

The investigation covered the period from July 2015 through April 2018. As part of the investigation, DHS OIG reviewed documentary evidence provided by the Complainant and the U.S. Coast Guard, including emails, memoranda, and U.S. Coast Guard discrimination, harassment, and bullying policies. Key witnesses interviewed include Complainant, individuals in her chain of command and rating chain, and the investigators of the administrative investigations convened by command. Specifically, DHS OIG interviewed the following persons:

- (1) [REDACTED] ("Complainant")
- (2) [REDACTED] ("Deputy Department Head")
- (3) [REDACTED] ("Department Head")
- (4) [REDACTED] ("Assistant Department Head")
- (5) [REDACTED] ("Academy Official1")



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- (6) [REDACTED] (“Academy Official2”)
- (7) [REDACTED] (“Academy Official4”)
- (8) [REDACTED] (“Academy Official3”)
- (9) [REDACTED] (“HQ Admiral1”)
- (10) [REDACTED] (“HQ Admiral2”)
- (11) [REDACTED] Department Head (“Investigator1”)
- (12) [REDACTED] (“Investigator2”)
- (13) [REDACTED] (“Investigator3”)
- (14) [REDACTED] Department Head
- (15) [REDACTED] (“Associate Dean”)

III. STATUTORY AUTHORITY

DHS OIG conducted this investigation pursuant to its authority under the MWPA, 10 U.S.C. § 1034, and the Inspector General Act of 1978, as amended.²

IV. FINDINGS OF FACT

Complainant is a Lieutenant Commander in the U.S. Coast Guard. Around [REDACTED] Complainant joined the Permanent Commissioned Teaching Staff as an instructor in the U.S. Coast Guard Academy’s [REDACTED] Department in New London, Connecticut. (Exh. 1) Complainant reported to [REDACTED] (“Department Head”), who became the head of the [REDACTED] Department around March 2015. (Exh. 4)

Prior to her assignment at the Academy, Complainant was on a year-long detail supporting the Secretary and Deputy Secretary of the Department of Homeland Security. (Exh. 1)

A. Events Occurring in 2015 and 2016

i. 2015 Equal Opportunity (“EO”) Complaint and Resolution

In July 2015, Complainant initiated the informal military EO complaint process (“EO Complaint #1”) with the U.S. Coast Guard Civil Rights Directorate representative at the Academy, alleging harassment and a hostile work environment by the Department Head based in part on race and gender. (Exh. 1) Complainant believed she was subjected to discrimination because a white male who had gone to the same school as her and worked in the [REDACTED]

² As appropriate, DHS OIG also utilizes case law on the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8), when analyzing the MWPA.



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Department did not experience the same hostility regarding his program and degree. (Exh. 1)

Academy Official1 engaged in several mediation sessions with Complainant and the Department Head, which resulted in a resolution agreement signed by Complainant and Academy Official1 in September 2015. (Exh. 1)

As part of the resolution agreement for EO Complaint #1, the Department Head was to select a military deputy department head (who was not initially told about the complaint or resolution agreement) to oversee military faculty. (Exhs. 4, 16) The resolution agreement also permitted Complainant to exercise a "Research Day" one day a week in the library. (Exhs. 1, 4, 16)

Sometime in the fall of 2015, the Department Head selected [REDACTED] [REDACTED] ("Deputy Department Head") to serve as the military Deputy Department Head. The Deputy Department Head's new role did not result in a formal title change, but he did become Complainant's immediate superior and her Supervisor for purposes of OERs (i.e., the first-line evaluator). (Exhs. 2-3)

The Department Head was involved in the mediation but was not a party to the signed resolution agreement. Nevertheless, he was aware of the terms being negotiated before Academy Official1 agreed to the terms. According to the Department Head, he was annoyed in part that the resolution agreement required him to create a deputy department head position earlier than he had planned. (Exh. 4) He was also surprised by the final terms, because most of the items were already permitted under existing policies.

ii. 2016 Harassment Complaint and Preliminary Inquiry

In March 2016, Deputy Department Head informed Complainant that the Department Head had three areas of concern regarding Complainant: 1) Complainant had office space or was conducting research in the library; 2) she wanted to work at the U.S. Coast Guard Research and Development Center over the summer; and 3) she influenced the decision to paint a wall orange in the [REDACTED] Department space. (Exh. 1) Because Complainant's resolution agreement permitted her to use the library one day a week as a research day, she was concerned that exercising her resolution agreement would negatively affect her performance evaluation. (Exh. 1)

On March 19, 2016, Complainant emailed a Civil Rights Directorate representative alleging breaches to the resolution agreement and discriminatory harassment by the Department Head, Deputy Department



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Head, and [REDACTED] (“Assistant Department Head”), a longtime member of the department who oversaw civilian matters and general curriculum issues (“March 2016 Harassment Complaint”). (Exh. 19) The representative treated the allegations as a harassment complaint (not an EO discrimination complaint), notified Academy Official1, and provided Academy Official1 with anti-harassment policy procedures. (Exh. 18)

Academy Official1 informed the Department Head, Deputy Department Head, and Assistant Department Head of the allegations in the complaint. (Exhs. 2, 3) They reported to DHS OIG feeling shocked after learning of the complaint. The Assistant Department Head stated that the Deputy Department Head seemed particularly affected by the complaint, to the point that the Assistant Department Head was concerned about the Deputy Department Head’s ability to drive home. They both discussed having not slept the night after learning of the complaint. (Exh. 3) The Deputy Department Head was so angry that on the same day as learning of the complaint, he drafted an email to himself demanding that Complainant apologize, then resign, for having made the complaint. (Exhs. 2, 23) The Deputy Department Head told DHS OIG that he never sent the email to anyone. (Exh. 2)

Academy Official1 ordered [REDACTED] (“Investigator1”), a [REDACTED] Department faculty member, to look into Complainant’s allegations, giving him discretion as to what form the investigation would take. (Exh. 1) Investigator1 conducted a preliminary inquiry, the least formal investigative process, and interviewed Complainant and the named parties, as well as two other faculty members. Because Academy Official1 convened an investigation, Complainant elected not to pursue the military EO complaint process. (Exh. 19)

During Investigator1’s investigation, one [REDACTED] Department faculty member told Investigator1 that that member saw bias against Complainant in subtle ways (such as through lack of trust, demeanor, conversation, and attitude). (Exh. 13 of Exh. 17) The member reported to Investigator1 that Complainant received more “kickback” (*i.e.*, flak) from the Deputy Department Head regarding the painted wall than that member, who was also involved in the decision to paint the wall, implying that they should have received equal flak. That member, who was a white male, was not sure why Complainant received more flak, and thought it may have been a sign of deeper frustrations.

In April 2016, Investigator1 completed his preliminary inquiry and concluded that:

Due to the complexity of this case, including its temporal development as well as the potential breadth of input that may be



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influencing it, this preliminary inquiry does not afford sufficient detail or depth to fairly conclude whether or not prohibited harassment has occurred. . . . To fully probe and objectively assess these allegations it is recommended that an investigation be initiated . . . and that the investigator be credentialed in Human Resources, EEO, Civil Rights, and/or Diversity and Inclusion so that the complex and widely varying perceptions by individuals associated with or impacted by this case can be expertly addressed. To minimize investigator opinion and recommendation bias and to ensure that there is no appearance of partiality associated with this investigation it is further recommended that the investigation be conducted by an individual who is (sic) does not currently interact or have a shared professional history with the persons involved”

(Exh. 17)

Despite Investigator1’s recommendations, neither Academy Official1 nor anyone else ordered a subsequent investigation into the allegations provided in the March 2016 Harassment Complaint. Instead, Academy Official2 convened a general climate and culture survey. Academy Official1 notified the Civil Rights Directorate that after reviewing the preliminary inquiry report, “I have found that the allegations are not substantiated within the scope and depth of the Preliminary Inquiry and have taken the following actions . . . I have decided to conduct an Administrative Investigation to examine, in greater detail, the climate and culture within the [REDACTED] Department of the Coast Guard Academy.” (Exh. 18)

iii. Initiation of the Climate and Culture Investigation

In consultation with Academy Official1, Academy Official2 assigned [REDACTED] (“Investigator2”), then the director of the [REDACTED],³ to conduct the administrative investigation into the climate and culture of the [REDACTED] Department (“Climate and Culture Investigation”). (Exhs. 5, 24) In an email, Academy Official2 told Investigator2 to “[a]void rabbit holes. All I want to know is if the overall climate is fair and respectful, in line with prescribed guidance, and conducive to mission accomplishment.” (Exh. 27) Investigator2 did not have a background in EO, civil rights, or other similar areas. (Exh. 9)

3 [REDACTED]



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Academy Official2 announced the initiation of the Climate and Culture Investigation to [REDACTED] Department staff on May 3, 2016. (Exhs. 1, 3, 25) In making the announcement, Academy Official2 referred to a complaint filed by a [REDACTED] Department member. Although Academy Official2 did not name the member, the Deputy Department Head told DHS OIG that it was not difficult for people to guess that the Complainant filed the complaint. (Exh. 3)

iv. Withdrawn May 2016 EO Complaint

Two days after Academy Official2 announced the climate investigation to the [REDACTED] Department staff, Complainant contacted the Civil Rights Directorate representative at the Academy to enter into the formal military EO process ("EO Complaint #2"). The Complainant alleged that she was being subjected to a hostile work environment by the Department Head in retaliation for filing EO Complaint #1 and the March 2016 Harassment Complaint. Complainant listed a negative endorsement by the Department Head for an award as an example of discrimination. (Exh. 28)

Upon being notified of Complainant's new complaint, Academy Official2 emailed Complainant that "the chain of command has already completed a Preliminary Inquiry dated 15 April 2016 which determined there was no substantiated basis of harassment, but that there were possible climate issues in the [REDACTED] Department." (Exh. 28) Academy Official2 wrote that Complainant should consider the Climate and Culture Investigation "as the Coast Guard Academy's opportunity to resolve the issue in relation to the Coast Guard Civil Rights [military] EO process." (Exh. 28)

Complainant told DHS OIG that she withdrew EO Complaint #2 after Academy Official2's email, because she was frustrated by the response, did not have the stamina to go through an investigation with no worthwhile outcome, and feared retaliation. (Exh. 1) When DHS OIG asked Academy Official2 why he suggested to Complainant that the Climate and Culture Investigation would be the Academy's opportunity to resolve the issue in relation to Complainant's specific allegations made in EO Complaint #2, Academy Official2 stated:

Bottom line is, I did not want to convene another investigation when I knew we had one already ongoing, it was the third one that we have convened, and that these issues could, and again, they were filed under the premise of EEO/CR, but when I read them, and I would say, when I looked at that, I was kind of like, okay, the Dorothy Stratton award. And I'm just—how in the world—and at this point in time—is that discriminatory? I think that that could be addressed, I'm confident that these issues you raise now can be



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addressed, and I do not want to convene another investigation from the standpoint of resources, time. And to be honest, given the rank requirement to do investigations, and the fact that throughout, you know, this was going to have to go through the EEO/CR process, we didn't have anyone else to bring in to do it, unless I literally brought someone from Boston or something, to come in and investigate, and I didn't feel compelled to do that.

(Exh. 6)

v. Results of the Climate and Culture Investigation

Investigator2 completed the Climate and Culture Investigation in May 2016, after interviewing almost all [REDACTED] Department staff. Investigator2 asked interviewees general yes or no questions about the climate of the department, but did not ask interviewees any questions relating to Complainant or her specific allegations in EO Complaint #2. (Exh. 9) Complainant did raise her allegations with Investigator2 during her interview, which was the last interview that Investigator2 conducted. (Exhs. 9, 29)

Investigator2 concluded in a memorandum to Academy Official2 that "there are no widespread or pervasive issues in the overall climate and culture within the Coast Guard Academy [REDACTED] Department." (Exh. 21) Investigator2 recommended against any department-wide action relating to the climate and culture, but found that "[t]here is one member who views the overall department climate as toxic." (Exh. 21) Investigator2 recommended that the concerns of that member "should be addressed consistently, fully and fairly on an individual, person-to-person basis." (Exh. 21)

In a separate, informal document, Investigator2 addressed the relationship between Complainant and the Department Head, and offered "some impressions, opinions and thoughts regarding how the situation got to where it is now, how it could have been avoided and most importantly, how it should (and should not) be addressed given where it is now." (Exh. 22) Investigator2 acknowledged that these findings were "outside the scope of the climate investigation" directed by Academy Official2, but believed it was his "duty to at least offer potential insights." Investigator2 wrote that the key to mending the relationship was "[n]ot formal communications involving resolution agreements, investigations and EEO complaints, but honest, person-to-person exchange regarding perceived performance, issues, slights, and anything else." Investigator2 also wrote: "The current situation cannot be fixed by directives, resolution agreements or mandated action from [Academy Official1] or [Academy Official3]."



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vi. Academy Official2's Response to Climate and Culture Investigation

After the Climate and Culture Investigation concluded in late May, Academy Official2 provided copies of Investigator2's informal opinions about Complainant and the Department Head to Complainant, the Department Head, Deputy Department Head, Assistant Department Head, and others. On May 31, 2016, Academy Official2 separately met with Complainant and [REDACTED] Department management. (Exhs. 1, 6, 31, 22)

According to Complainant, Academy Official2 seemed agitated and angry at times during the briefing, and kept slamming his hand on a large stack of papers that he referred to as the Climate and Culture Investigation, while noting its and the prior investigation's unsubstantiated conclusions. (Exh. 1) Complainant told DHS OIG that Academy Official2 also reminded Complainant that she took an oath to be an officer, which she took to mean that she should stop raising issues, because the Department Head was her boss and there was nothing she could do about it. (Exh. 1) One witness who attended the meeting also observed palpable animosity from Academy Official2 against Complainant. (Exh. 10)

According to Complainant, Academy Official2 asked if Complainant intended to file a formal complaint. Complainant believed that the Climate and Culture Investigation was undertaken by command to cover up or bury any findings from the first investigation, so that if Complainant did file a formal EO complaint, the Academy would have the documents to make it appear that they thoroughly looked into things and concluded there were no problems. (Exh. 1)

After the meeting, Academy Official2 and Complainant had an email exchange regarding Complainant's summer schedule. (Exhs. 31-32) Academy Official2 wrote: "Based on the Command's review of the three inquiries/investigations conducted by [Academy Official1], [Investigator1], and [Investigator2], we have determined that you have not been subject to substantiated harassment and that the climate and culture of the Coast Guard Academy [REDACTED] Department is sound." Academy Official2 laid out her summer schedule and associated duties, which included two days a week working at the Research and Development Center.

Complainant responded with a few clarifying questions and reiterated her belief that the issue was workplace bullying and harassment. (Exh. 32) On June 1, 2016, Academy Official2 responded: "Three investigative processes have been completed that do not substantiate your allegations, but rather point to a



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damaged professional working relationship between you and [the Department Head]. It is time to mend that relationship for the good of each one of you, the good of the Dept, and the good of the Academy.”⁴

vii. Complainant’s June 2016 Meeting with DHS Deputy Secretary

On June 23, 2016, while in Washington, D.C., Complainant briefly met with the Deputy Secretary of DHS, Alejandro Mayorkas, whom she had worked for before becoming a faculty member with the Academy. (Exhs. 1, 33) Complainant told Deputy Secretary Mayorkas that she was experiencing discrimination, bullying, and harassment at the Academy and that the Academy had swept her allegations under the rug. (Exhs. 1, 33) Deputy Secretary Mayorkas emailed the Commandant of the U.S. Coast Guard, Paul Zukunft, about the conversation for his handling. (Exh. 33) The Commandant forwarded the email to [REDACTED] (“Academy Official3”). On June 24, 2016, Academy Official3 forwarded the email to an admiral in his chain of command, adding, “[d]isappointed that [Complainant] took this route going directly to Dep Sec but it is what it is.” Academy Official3 also sent the email chain to Academy Official1. (Exh. 33)

When DHS OIG asked Academy Official3 if he thought it was improper for Complainant to have gone to the Deputy Secretary, he confirmed that he thought it was. (Exh. 7) Academy Official3 stated that although the Deputy Secretary is eventually in the chain of command, “there’s a process. And going to the Deputy Secretary is not necessarily following the chain [of command].” (Exh. 7)

Academy Official3 had kept notes regarding Complainant in a draft email. (Exh. 7) In a list of what the Academy Official3 described to DHS OIG as “frustrations” regarding Complainant, he wrote that “[Complainant] visited Dep Sec DHS under false pretense[,] accusing the [Academy] of bullying, discrimination, harassment.” (Exh. 36) Academy Official3 told DHS OIG that his statement was just his opinion based on the email from the Deputy Secretary. (Exh. 7)

⁴ Academy Official2 told DHS OIG that his reference to Academy Official1 in stating that there had been three inquiries or investigations was based on his belief that Academy Official1 had conducted some form of informal inquiry prior to his 2015 meditation regarding EO Complaint #1. (Exh. 6) Academy Official1 told DHS OIG that he did not conduct any inquiry or investigation, and that Academy Official2’s statement was inaccurate. (Exh. 5) There is no evidence in the record that supports Academy Official2’s assertion that there were three investigations. At that point in time, there had been two investigative processes: 1) the preliminary inquiry conducted by Investigator1; and 2) the Climate and Culture Investigation.



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viii. Complainant's June 2016 Meeting with Academy Official3 and Subsequent Workplace Changes

In late June 2016, the week following the email from the Deputy Secretary, Complainant met with Academy Official3 and described what she believed was discrimination, bullying, and harassment, using PowerPoint slides to go over U.S. Coast Guard policies on the issues. During that meeting, Complainant requested that she be transferred out of the [REDACTED] Department, which Academy Official3 did not approve. (Exhs. 1, 18)

However, as a result of related stress from the situation, Academy Official3, in consultation with medical staff, temporarily assigned Complainant directly under Academy Official1 for the summer of 2016. (Exhs. 4, 7) The Department Head told DHS OIG that he was not given the reason for the change, but thought Complainant had filed another complaint, this time directly to Academy Official3. (Exh. 4) By this time, Academy Official2 had left the Academy, and [REDACTED] ("Academy Official4") became [REDACTED]. (Exhs. 6, 12)

In August 2016, Academy Official1 temporarily changed Complainant's rating chain so that Department Head would no longer be the Reporting Officer, who is second in the rating chain. (Exhs. 7, 42). Instead, an Associate Dean, [REDACTED] ("Associate Dean"), served as the Reporting Officer, with the Department Head serving only as the Reviewer, who is third in the chain. Academy Official1 described the role of the Reviewer as making sure the form is filled out correctly. (Exh. 5) The Deputy Department Head remained Complainant's Supervisor, who completes the majority of an OER. (Exh. 5)

ix. 2015-2016 Officer Evaluation Report (OER) Completed in Summer 2016

On August 18, 2016, prior to the new rating chain being implemented, Complainant received her OER for the period of June 1, 2015, to May 31, 2016. (Exh. 42) The 2015-2016 OER went through several drafts, and the Department Head and Deputy Department Head had multiple conversations throughout the summer of 2016 about the OER. (Exhs. 42, 43)

The OER had sections to be filled out by the Supervisor and Reporting Officer, with only one line for the Reviewer to authenticate the OER. The Deputy Department Head served as the Supervisor and completed the first two pages of the OER, and the Department Head served as the Reporting Officer, completing the last page. (Exh. 44)



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The first draft the Deputy Department Head provided to the Department Head had several marks of four and five (on a scale of one to seven). (Exh. 43) The second draft had several marks of five, but no marks of four. (Exh. 42) The third draft had marks of six or seven for all categories, but the final version the Deputy Department Head provided to the Department Head had two marks of five (in Adaptability and Evaluations). The Department Head, as the Reporting Officer, also gave a mark of five in Judgment. At one point in the process, the Associate Dean, as Reviewer, emailed the Department Head that: “Very few officers who aren’t formal supervisors are getting a ‘6’ in evaluations.” (Exh. 42) The Deputy Department Head told DHS OIG that this feedback was relayed back to him through the Department Head, resulting in the change from six to five in Evaluations. (Exh. 2)

The Department Head told DHS OIG that the Academy Official¹ “put a bunch of pressure on me to move [Complainant’s] marks up,” resulting in the Department Head meeting with the Deputy Department Head more than once to discuss the good things Complainant had done, particularly for the larger Academy community. (Exh. 4) When asked about how the third version, with all marks of six or seven, was changed to have three marks of five, the Department Head said that he also told the Deputy Department Head “not to swing the pendulum too far,” unless it was warranted. (Exh. 4)

The Deputy Department Head described Complainant’s performance as strong during this period. However, the Deputy Department Head also told DHS OIG that the Department Head was “pretty critical” of Complainant’s performance, and persuasively communicated to the Deputy Department Head issues about her performance. For instance, the Department Head had raised issues about Complainant reaching outside the chain of command after an issue had been addressed with Complainant, and her not meeting expectations to be in the office more to support cadets.⁵ At the same time, the Deputy Department Head acknowledged that he was unaware of any complaints from cadets.

The Deputy Department Head told DHS OIG that Academy Official¹ was not involved in the OER process. (Exh. 2) The Associate Dean also stated that Academy Official¹ does not get involved in OERs when he is not in the rating chain, though he may discuss performance issues regarding members. (Exh. 11) However, in one email to the Department Head about Complainant’s OER, the Associate Dean stated: “I know that you and [Academy Official¹] have been talking.” (Exh. 42) Academy Official¹ did not recall talking specifics of Complainant’s OER with the Department Head, but did recall discussing more

⁵ Deputy Department Head did not provide specific examples of Complainant reaching outside the chain of command.



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generally whether the Deputy Department Head was meeting OER deadlines. (Exh. 5)

During this rating period, all other O-3 and O-4 officers in the [REDACTED] Department received sixes in Evaluations. They also received sixes in the periods immediately prior to and after that rating period (including Complainant in her previous and subsequent OERs). (Exh. 44) Other than Complainant, no other O-3 or O-4 officer in the [REDACTED] Department received a mark of five in any category during, immediately prior to, or immediately after this period. (Exh. 2)

B. January 2017 EO, Harassment, and Bullying Complaints

On January 27, 2017, Complainant emailed Academy Official4 and alleged she was being subjected to bullying, harassing, and discriminatory behavior because of, among other things, her race, gender, and prior EO activity. Complainant also alleged that the Academy Official1, Academy Official2, and Academy Official3 condoned the behavior by creating an intimidating environment and dismissing Complainant's reports. (Exhs. 12, 37) On the same day, Complainant emailed the Civil Rights Directorate representative to enter into the military EO process with similar allegations ("EO Complaint #3"). (Exhs. 1, 38)

Because Academy Official3 was a named party, Academy Official4 coordinated with [REDACTED] ("HQ Admiral1"), located at the Coast Guard headquarters, to have HQ Admiral1 address the allegations. HQ Admiral1 was [REDACTED] (Exhs. 12, 14, 38)

i. Administrative Investigation into Harassment and Bullying

In February 2017, HQ Admiral1 selected a Coast Guard headquarters attorney, [REDACTED] ("Investigator3"), to conduct the administrative investigation into Complainant's harassment and bullying allegations (the EO process was proceeding in parallel). (Exhs. 1, 14) Investigator3 interviewed 15 witnesses, including Academy Official1, but not Academy Official2 or Academy Official3, and identified instances of bullying behavior and similar offensive conduct against Complainant. (Exh. 39)



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Specifically, in May 2017, Investigator3 issued a memorandum to HQ Admiral1 concluding that:

the evidence failed to reveal blatant acts of discrimination or bullying. The evidence presented, when reviewed as a whole, creates a picture of offensive conduct towards [Complainant] that is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. Further, the evidence demonstrates [Complainant] experienced some bullying behaviors in the form of work interference, undermining performance, or damage to her reputation. As required by [the U.S. Coast Guard Civil Rights Manual] and [the Coast Guard Hazing and Bullying Policy], such behaviors may not be allowed to continue.”

(Exh. 39)

Investigator3 noted “several actions in which [Complainant’s] qualifications were downplayed. Also, there are several actions that could negatively impact her confidence and her career or reputation. Further, there are several instances in which it seems her chain of command is harassing/bullying her.” (Exh. 39)

Some of the issues identified were the Department Head’s statements and views that Complainant’s research was illegitimate, which he expressed to Complainant in front of a third party, the Department Head’s negative characterization to Academy Official1 of a conference call with an admiral that did not appear warranted based on subsequent emails with the admiral’s staff, and Complainant’s lowered marks for the 2015-2016 OER that were not completely consistent with Complainant’s accomplishments. (Exh. 39)

Investigator3 went so far as to say that a review of Complainant’s accomplishments during the 2015-2016 OER period “lends itself to the conclusion that the marks were lowered based on outside influences, versus unbiased opinion and identifiable behaviors (the OER followed the EO complaint filed by the officer against the supervisor).” (Exh. 39)

Investigator3 noted that the Department Head had concerns about Complainant’s availability within the department, Complainant’s availability to the cadets, and Complainant’s assumption of collateral duties within the department. Investigator3 found “no supporting evidence” “that lends credence to these concerns.” Instead, Investigator3 found that Complainant taught the same amount of classes (or more) compared to others in the department, had a



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number of collateral duties, and did not receive any complaints from cadets about her availability. Investigator3 concluded: “The picture that has evolved is of an officer and instructor who is extremely dedicated to the cadets and the missions of the Coast Guard.”

Investigator3 further wrote: “Undeniably, repeated questions regarding a person’s suitability to do their job and comments that belittle a person’s work would cause a person to have insecurities. Such statements are degrading. It begs the question as to why the [Academy] administration would place her in the position, while the Department Head appears to have much visible angst with that decision.” (Exh. 39)

Investigator3 also concluded that Complainant’s reputation within the [REDACTED] Department was likely negatively impacted by the handling of the Preliminary Inquiry conducted by Investigator1 and the Climate and Culture Investigation. (Exh. 39)

Investigator3 recommended that Complainant be given the opportunity to leave the Academy, that Complainant be detailed to the [REDACTED] Department, or that the Department Head be removed from Complainant’s rating chain and her office moved to a more neutral location. Investigator3 also recommended that the entire Academy chain of command receive additional civil rights training, but did not believe that disciplinary action was required. (Exh. 39)

ii. HQ Admiral1’s Response to Findings of Investigation

On May 12, 2017, HQ Admiral1 emailed Academy Official3 and Academy Official4 to inform them that:

The administrative investigation into allegations that [Complainant] was subject to bullying, harassment and a hostile environment is complete. The evidence failed to reveal blatant acts of discrimination or bullying. When reviewed as a whole, though, the evidence creates a picture of offensive conduct toward [Complainant] that is at a level to create a work environment that a reasonable person could consider intimidating, hostile or abusive. I have read the report and agree with the investigating officer’s portrayal of the situation.

(Exh. 40)

HQ Admiral1 sent two different draft memoranda to the Academy for their feedback: one directed that the Complainant be transferred to the [REDACTED]



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Department, while the other directed Academy Official⁴ to negotiate a resolution agreement with Complainant and encouraged the Complainant's transfer to the [REDACTED] Department as part of the agreement.⁶

Within a few days of the email, HQ Admiral¹ had a phone conversation with at least Academy Official³ and Academy Official⁴. HQ Admiral¹ did not specifically recall the conversation, but Academy Official³ did and told DHS OIG that he requested that HQ Admiral¹ allow him to handle the matter, stating: "I just felt like, hey, I'm the guy in command, give me this investigation, with its recommendations, and I'd like to handle it." (Exhs. 7, 14) Academy Official⁴ similarly told DHS OIG that the call centered on what would set the department and Complainant on the best path for the future, and that Academy Official³ advocated for having the ability to manage the issue. (Exh. 12)

A day later, on May 17, 2017, HQ Admiral¹ signed a memorandum to the Academy similar to the draft that directed Academy Official⁴ to negotiate a resolution agreement, with some modifications giving the Academy more flexibility. For example, the final memorandum did not order Academy Official⁴ to "negotiate a resolution agreement," but instead only to "enter into settlement negotiations." Further, the draft memorandum encouraged Academy Official⁴ to transfer Complainant as part of the agreement, but the final version only encouraged him to "consider" transferring Complainant as part of the agreement.

At the suggestion of his legal staff, HQ Admiral¹ also added a line directing that "[a]ny such agreement, though, must resolve and dismiss all outstanding complaints filed by [Complainant], formal or informal, which are currently pending against the Coast Guard." (Exh. 41) (See a comparison of the memoranda in Appendix A.)

Separately, HQ Admiral¹ issued a memorandum to the Civil Rights Directorate stating that:

After reviewing this investigation, I find that the allegations are unsubstantiated. However, because the investigation highlighted communication and leadership challenges that need to be addressed, I directed corrective action to improve [Complainant's] work environment. I also encouraged [Academy Official³] to

⁶ HQ Admiral¹ told DHS OIG that he was supportive of transferring Complainant to the [REDACTED] Department, but was undecided about which memorandum would be better, and was looking for Academy Official³'s perspective because Academy Official³ would have to execute whatever direction was given. (Exh. 14)



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carefully review the investigation and use it to critically evaluate the climate at the Academy, particularly the [REDACTED] Department.

(Exh. 41)

In addition, HQ Admiral1 issued a memorandum to Complainant stating only that the investigation was complete and, “[a]fter reviewing the investigation, I directed [Academy Official2] to meet with you to address and resolve your concerns. I also encouraged [Academy Official3] to carefully review the investigation and use it to critically evaluate the climate at the Academy, particularly the [REDACTED] Department.” (Exh. 41) Complainant was told her allegations were unsubstantiated by Commander [REDACTED] (“HQ Staff Judge Advocate”), the staff judge advocate providing assistance to [REDACTED] on the matter. (Exh. 41)

HQ Admiral1 told DHS OIG that he never changed his opinion — which he previously stated in the May 12, 2017 email — that he agreed with the investigator’s findings. (Exh. 14) HQ Admiral1 told DHS OIG that he “didn’t know” why he failed to mention the evidence of a hostile work environment in the memorandum to the Civil Rights Directorate. HQ Admiral1 stated that because Investigator3 found no blatant discriminatory actions, he viewed the specific allegations of harassment or a hostile work environment based on a protected class as not substantiated. (Exh. 14)

iii. Actions Taken After HQ Admiral2 Became [REDACTED]

HQ Admiral1 retired a few days after issuing his May 17 memos, and was replaced by [REDACTED] (“HQ Admiral2”). (Exh. 15, 41) HQ Admiral2 was briefed on Complainant’s situation and read a large portion of Investigator3’s memorandum no later than May 29, 2017, when he requested to meet with the HQ Staff Judge Advocate. (Exh. 41)

On May 31, 2017, in an email with the subject line “Interested in a Mission Impossible?” the HQ Staff Judge Advocate asked an officer if she had:

any interest in a special project that might help out a LCDR at the Academy. She is going to be negotiating with the Academy to settle her civil rights complaint, which has some merit. [HQ Admiral2] would like to assign her someone to assist her during the process that is not beholden to the Academy.



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(Exh. 41)

Later that same day, the HQ Staff Judge Advocate informed HQ Admiral² that although he had “several potential candidates identified to serve as a representative for [Complainant] during her negotiations with” Academy Official⁴, he had learned that Complainant had hired a civilian attorney. (Exh. 41) The HQ Staff Judge Advocate also told HQ Admiral² that the Academy’s staff judge advocate expressed concern about a plan to provide Complainant with an opportunity to review Investigator³’s investigation. The HQ Staff Judge Advocate recommended providing Complainant with an opportunity to review it. (Exh. 41)

On June 5, 2017, HQ Admiral² issued a findings and outcome memorandum to another office within the U.S. Coast Guard, addressing Complainant’s bullying allegations that were investigated as part of Investigator³’s investigation.⁷ (Exh. 41) Similar to HQ Admiral¹’s memorandum to the Civil Rights Directorate, HQ Admiral² wrote that after reviewing the investigation, he found that “no acts of bullying were substantiated by the administrative investigation.” (Exh. 41)

Consistent with HQ Admiral¹’s direction, Academy Official⁴ did attempt to engage with Complainant and her counsel regarding mediation on more than one occasion, but Complainant declined to enter into mediation. (Exh. 41) On June 11, 2017, Academy Official⁴ temporarily assigned Complainant to the [REDACTED] Department. (Exh. 41) In July 2017, Academy Official⁴ communicated to Complainant possible solutions to the situation that were under consideration, and gave Complainant the opportunity to provide feedback. The options included pursuing a post-doctoral fellowship or doing a detail with the Research and Development Center. (Exh. 41)

At the request of Complainant, however, Academy Official⁴ instead permitted Complainant to stay in the [REDACTED] Department for the academic year. (Exh. 41) Academy Official⁴ encouraged Complainant to propose a two-year fellowship for after the academic year, then plan to return to the [REDACTED] Department at the conclusion of the fellowship. (Exh. 41) Academy Official⁴ told DHS OIG that the [REDACTED] Department head rotates every several years, and that the Department Head would no longer be head by the time Complainant would have returned to the department. (Exh. 12)

⁷ HQ Admiral¹ inadvertently failed to issue the bullying findings and outcome memorandum, which was brought to the attention of the HQ Staff Judge Advocate by Complainant. (Exh. 41)



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C. Recent Developments

On February 22, 2018, the U.S. Coast Guard issued a Final Agency Decision (FAD) for Complainant's 2017 EO complaint, finding that she failed to prove by a preponderance of the evidence that she was subjected to discrimination. (Exh. 48) On July 3, 2018, the DHS Office for Civil Rights and Civil Liberties denied Complainant's request for reconsideration of the FAD. (Exh. 49)

In January 2018, a different member of the [REDACTED] Department filed a complaint alleging harassment and bullying behavior by the Department Head. (Exh. 46) HQ Admiral2 convened an administrative investigation, which was completed on March 26, 2018. (Exh. 46) In a memorandum dated April 20, 2018, HQ Admiral2 found that the actions of the Department Head constituted bullying and directed the Academy to take proactive steps to improve the climate of the [REDACTED] Department. (Exh. 46)

Separately, on April 6, 2018, the [REDACTED] Department, with the support of the [REDACTED] Department Head, requested that Academy Official1 approve Complainant's permanent move to the [REDACTED] Department as part of a billet swap. On Saturday, April 21, 2018, Academy Official1 approved the request for Complainant to be permanently reassigned to the [REDACTED] Department. (Exh. 5)

On April 19, 2018, DHS OIG sent a request to U.S. Coast Guard attorneys to arrange an interview with Academy Official3 as part of this investigation, and informed them of our plan to interview a number of other individuals at the Academy. The Academy's staff judge advocate was informed no later than April 20, 2018. On April 23, 2018, DHS OIG directly contacted Academy Official1, the Department Head, and several others at the Academy to request interviews.

On April 24, 2018, Academy Official1 requested, and Academy Official3 approved, the removal of the Department Head as the head of the [REDACTED] Department due to a loss of confidence relating to the substantiated bullying allegation that involved the other Academy faculty member. (Exhs. 5, 46)

V. ANALYSIS – ALLEGED RETALIATION

In reviewing whether Complainant suffered retaliation as a result of protected whistleblower activity, a determination must be made regarding whether the following elements were present: (1) one or more protected communication(s); (2) knowledge by a responsible management official of the protected communication(s); (3) personnel action(s) taken, threatened, or withheld; and (4) a causal connection between the protected disclosure and the adverse



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action. If the evidence establishes that the four elements are present, the analysis shifts to whether evidence shows that the Agency would have taken the personnel action absent the protected communication.

The evidence substantiates a retaliation complaint if the evidence indicates that there was no independent basis upon which the personnel action would have been taken, threatened, or withheld, absent the protected communication. Conversely, if the evidence establishes that the Agency would have taken, threatened, or withheld the personnel action absent the protected communication, then the evidence does not substantiate the complaint.

The standard of proof for the first four elements is preponderance of the evidence, which means the degree of evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. The standard of proof following the burden shift is clear and convincing evidence, which is a higher standard than preponderance of evidence and is the degree of proof that produces in the fact finder's mind a firm belief as to the allegations sought to be established.

A. Protected Communications

The MWPA protects communications “in which a member of the armed forces complains of, or discloses information that the member reasonably believes constitutes evidence of, any of the following: (A) A violation of law or regulation, including a law or regulation prohibiting . . . unlawful discrimination.”⁸ “Unlawful discrimination” includes discrimination based on race and sex.⁹

To be a protected communication, the member must make the communication to one of several entities, including “any person or organization in the chain of command” or “any other person or organization designated pursuant to regulations or other established administrative procedures” to receive such communications.¹⁰ The U.S. Coast Guard has designated the Civil Rights Directorate as a venue to receive discrimination complaints. (Exh. 45)

DHS OIG finds that Complainant made the following five protected communications, either to her chain of command or to the Civil Rights Directorate:

⁸ 10 U.S.C. § 1034(c)(2)(A).

⁹ *Id.* § 1034(j)(3).

¹⁰ *Id.* § 1034(b)(1)(B).



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- (1) The July 2015 allegations of discriminations made to the Civil Rights Directorate representative as part of EO Complaint #1;
- (2) The March 2016 Harassment Complaint of discriminatory harassment and a hostile work environment made to the Civil Rights Directorate representative;
- (3) The May 2016 allegations of discrimination made to the Civil Rights Directorate representative as part of EO Complaint #2;
- (4) The June 2016 allegations of discrimination made both to the Deputy Secretary of DHS and Academy Official³; and
- (5) The January 2017 allegations of discrimination to Academy Official⁴ and the Civil Rights Directorate representative as part of EO Complaint #3 and the concurrent harassment and bullying complaint.¹¹

The MWPA protects a member both when a member “complains of” misconduct, including of unlawful discrimination, and when a member “discloses information that the member reasonably believes constitutes evidence of” misconduct. 10 U.S.C. § 1034(c)(2). By distinguishing between the two types of protected communications, Congress indicated that there is no reasonableness requirement when a member “complains of” unlawful discrimination. In addition, Commandant Instruction M5350.4C, Coast Guard Civil Rights Manual, which prohibits unlawful discrimination and provides the procedures for reporting unlawful discrimination, also prohibits reprisal for filing such complaints without reference to the reasonableness of the filing.

Regardless, DHS OIG finds that Complainant had a reasonable belief that her allegations disclosed evidence of unlawful discrimination prohibited by the U.S. Coast Guard Civil Rights Manual. Complainant filed EO Complaint #1 after receiving negative treatment that was not experienced by a white male colleague who had similar credentials. In addition, Complainant filed the March 2016 Harassment Complaint after, among other things, the Deputy Department Head criticized her involvement in having an office wall painted, when a white male colleague also involved in the painting did not receive as much criticism. Complainant filed EO Complaint #2, made the June 2016 disclosures of discrimination, and filed the January 2017 complaints after experiencing harassing behavior by Department Head for more than a year, as

¹¹ Complainant also alleged making protected communications relating to alcohol use at the Academy. DHS OIG did not find evidence that Complainant made protected communications relating to alcohol.



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was documented by Investigator3. Although Investigator3 did not find any “blatant” instances of discrimination, Complainant was reasonable to connect the instances of harassment to the fact that she was the only [REDACTED].

This investigation does not address the merits of the underlying discrimination, harassment, and bullying allegations that constituted the protected communications Complainant made.¹² By reasonably complaining of unlawful discrimination to persons in the chain of command or the representatives of the office designated to receive such complaints, Complainant made protected communications under 10 U.S.C. § 1034(c)(2).¹³

B. Knowledge of the Protected Communications

A preponderance of the evidence in the record shows that the Academy Official3, Academy Official2, Academy Official1, Department Head, and Deputy Department Head were all aware of EO Complaint #1 from July 2015 and the March 2016 Harassment Complaint no later than March 2016. (Exhs. 2, 4, 5, 6, 7) Academy Official4 learned of the complaints when he arrived at the Academy in the summer of 2016. (Exh. 12)

The record also indicates that Academy Official1, Academy Official2, and Academy Official3 had knowledge of Complainant’s May 2016 EO complaint that was withdrawn. (Exhs. 5-7) The record further demonstrates that at least Academy Official1 and Academy Official3 were aware that Complainant raised her discrimination, harassment, and bullying allegations with Deputy Secretary Mayorkas in June 2016. (Exh. 33)

Academy Official1 and Academy Official3 also knew that Complainant subsequently made these allegations directly to the Academy Official3 later in June 2016, which the Department Head also suspected when Academy Official3 told him in the summer of 2016 that Complainant would be working

¹² Under 10 U.S.C. § 1034(d), “the Inspector General . . . shall conduct a separate investigation of the information that the member making the allegation believes constitutes evidence of wrongdoing . . . if there previously has not been such an investigation or if the Inspector General determines that the original investigation was biased or otherwise inadequate.” DHS OIG determined that although the two 2016 investigations convened by Academy leadership were inadequate, the 2017 investigation conducted by Investigator3 was an adequate investigation into Complainant’s allegations (notwithstanding the response to that investigation by the HQ Admiral1 and HQ Admiral2).

¹³ Importantly, a complainant need not prove that the unlawful violation actually occurred for the complainant to have such a reasonable belief. *See Drake v. Agency for Int’l Dev.*, 543 F.3d 1377, 1382 (Fed. Cir. 2008) (analyzing the “reasonable belief” standard under the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8)).



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for Academy Official1 during that summer. (Exhs. 4, 5, 7) Finally, the evidence indicates that Academy Official1, Academy Official3, Academy Official4, Department Head, and Deputy Department Head were aware of Complainant's January 2017 bullying, harassment, and discrimination complaints after Investigator3 began interviewing individuals in the few months following the complaint. (Exh. 41)

C. Personnel Actions

The MWPA defines a personnel action as:

- (1) The taking, or threat to take, an unfavorable action;
- (2) The withholding, or threat to withhold, any favorable action;
- (3) The making of, or threat to make, a significant change in the duties or responsibilities of a member of the armed forces not commensurate with the member's grade;
- (4) The failure of a superior to respond to any retaliatory action or harassment (of which the superior had actual knowledge) taken by one or more subordinate against a member; or,
- (5) The conducting of a retaliatory investigation of a member.¹⁴

Of the various actions Complainant alleged were retaliatory during the relevant time period,¹⁵ the record demonstrates that the following actions qualify as personnel actions under the MWPA:

- (1) Complainant's OER marks for the period ending May 31, 2016; and
- (2) The withholding of a favorable action from June 2016 until June 2017; specifically, a transfer out of the [REDACTED] Department.

The evidence in the record did not show that Complainant's other allegations during this time period rose to the level of a prohibited personnel action under the MWPA. For example, Complainant stated that in January 2017, the Department Head and Assistant Department Head removed two instructors from her independent study course. (Exh. 1) The evidence indicates that the

¹⁴ 10 U.S.C. § 1034(c)(2).

¹⁵ Under the MWPA, an OIG need not investigate allegations made more than one year after the date the member becomes aware of a personnel action subject to the allegation. 10 U.S.C. § 1034(c)(5). However, protected communications alleged by Complainant to have occurred more than one year prior to the complaint to DHS OIG were reviewed, because an older protected communication can still contribute to a personnel action several months, or even years, following the protected communication.



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removal of the instructors was not a significant change in the duties or responsibilities of Complainant, particularly because the removal was only a removal of their names in the course registration system. The Department Head credibly explained that Complainant could still have had the individuals assist with the course. (Exh. 4) Accordingly, this action does not meet the definition of a prohibited personnel action under the MWPA.

In addition, the record demonstrates that the various memos Academy Official4 issued to Complainant in the summer of 2017 concerning her temporary assignment to the [REDACTED] Department, options for pursuing fellowships, potential assignment to the Research and Development Center, and direction concerning her eventual return to the [REDACTED] Department were not personnel actions under the MWPA. Specifically, the evidence indicates that the options presented to Complainant were based on previous requests made by Complainant as part of her complaints. (Exhs. 12, 41) There is no evidence that indicates that Academy Official4 or anyone else involved in issuing the memoranda had reason to believe that these proposed options were not favorable to Complainant. Notably, Academy Official4 modified the options after receiving feedback from Complainant. (Exhs. 12, 41) Academy Official4 told DHS OIG that the options would have gotten Complainant out of the [REDACTED] Department for the remainder of the time that the Department Head was scheduled to remain in the position. (Exh. 12) Accordingly, a preponderance of the evidence indicates that the issuance of these memoranda did not constitute personnel actions under the MWPA.

D. Causation

To establish causation, a preponderance of the evidence must demonstrate that a protected communication was a contributing factor in an adverse action. Causation can be established by circumstantial evidence indicating that a complainant's protected communication was one of the factors tending to influence the outcome of a decision. Courts have found causation established "[i]f a whistleblower demonstrates both that the deciding official knew of the disclosure and that the [adverse] action was initiated within a reasonable time of that disclosure."¹⁶

When this "knowledge/timing" test is satisfied, "no further nexus need be shown, and no countervailing evidence may negate the [complainant]'s showing."¹⁷ Courts have been reluctant to specify a precise time period as "reasonable" under the "knowledge/timing" test; however, courts generally

¹⁶ See *Kewley v. Dep't of Health & Human Servs.*, 153 F.3d 1357, 1363 (Fed. Cir. 1998).

¹⁷ *Id.*



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consider actions taken within the same performance evaluation period or within one year to satisfy the test.¹⁸

A preponderance of the evidence establishes that Complainant's protected communications were a contributing factor in the OER prepared over the summer of 2016. Both the Department Head and Deputy Department Head, who gave marks and comments in the OER, had knowledge of at least the first two of Complainant's protected communications made at that point. By the time Complainant received her OER, the oldest protected communication — the EO Complaint #1 from July 2015 — was only slightly older than one year.

A preponderance of the evidence also establishes that Complainant's protected communications were a contributing factor in Academy Official3's denials to move Complainant out of the [REDACTED] Department beginning in June 2016. Complainant's request to be moved was denied by Academy Official3 within just a few days of Academy Official3 learning of Complainant's protected communication to the Deputy Secretary of DHS, and during the same meeting in which Complainant made a protected communication directly to Academy Official3. Academy Official3 was also aware of Complainant's prior protected communications.

E. Burden Shift Analysis

Because a preponderance of the evidence demonstrates that protected communications were a contributing factor in Complainant's OER marks and the denial of her request to be moved from the [REDACTED] Department, DHS OIG next analyzes whether clear and convincing evidence demonstrates that the agency would have taken the same actions absent the protected communications. In making this assessment, DHS OIG generally considers the following factors for MWPA complaints:

- (1) The strength of the agency's reason for the personnel action when the protected communication is excluded;
- (2) The existence and strength of any motive to retaliate for the whistleblowing; and

¹⁸ See *id.*; see also *Jones v. Dep't of the Interior*, 74 M.S.P.R. 666, 673-78 (M.S.P.B. 1997) (applying the "per se" knowledge/timing test to a performance evaluation that "was prepared just over one year after the appellant made his protected disclosures").



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(3) Any evidence of similar action against similarly situated employees for the non-whistleblowing aspect alone.¹⁹

DHS OIG analyzes each personnel action separately, beginning with the OER.

i. Evidence that the OER Marks Were Not Retaliatory

a) Strength of the Reasons for the OER Marks

Little documentary evidence exists to support the reasons for the marks in Complainant's OER. The Deputy Department Head did write a rationale for his first draft, which included several marks of four or five, but those were not the ultimate marks, and the rationale was vague. (Exh. 43) For example, the Deputy Department Head had proposed a mark of four for Adaptability, with a rationale in part:

Very quick to provide recommendations that could be construed as voice of many/unit rather than own personal opinion causing supervisor, department head, [Academy Official1] and [Academy Official3] concern having not been pre-briefed and asked to weigh-in. Addressed by Dept. Head, yet continued to occur.

(Exh. 43)

The Deputy Department Head could not recall specifically what he had in mind here, but noted to DHS OIG that he learned of the issue from the Department Head. (Exh. 2)

When DHS OIG asked the Department Head about this note, he came up with two examples from this time period: one involved a conference call with a headquarters admiral who was uncomfortable with how far out Complainant was pushing on cyber, and another was a strategic scenario planning event that Complainant did at the Academy involving cadets and headquarter individuals that was a surprise to the Department Head. (Exh. 4)

The first example was addressed by Investigator3, who found email evidence suggesting that the headquarters admiral and his staff actually had positive views of Complainant's work, with one officer thanking Complainant "for the great teleconference" and writing that "Admiral Thomas and the rest of us were very impressed with the work your cadets are doing." (Exh. 39)

¹⁹ *Duggan v. Dep't of Defense*, 883 F.3d 842, 846 (9th Cir. 2018) (considering these factors in the context of the Whistleblower Protection Act); *Greenspan v. Dep't of Veterans Affairs*, 464 F.3d 1297, 1303 (Fed. Cir. 2006) (same).



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Emails relating to the second example regarding the strategic scenario planning event also failed to support the Department Head's claims that Complainant would surprise her command or fail to pre-brief him on matters. Complainant informed the Department Head about the opportunity the day after learning details about the proposed event from a headquarters commander and two months in advance of the proposed date. (Exh. 34) After Complainant emailed a summary of the opportunity to the Department Head, however, the Department Head forwarded the chain to Academy Official1 stating that "I currently have no visibility" on any formal request from the headquarters unit. Thus, if anything, these emails support Complainant's contention that the Department Head influenced others to view her negatively.

Significantly, DHS OIG found no written documentation showing the Department Head's attempt to address issues with Complainant during this period. When asked why not, the Department Head told DHS OIG:

There were maybe emails back and forth, but why was there no— honestly? I think there was a lot of fear and eggshells around her, that she kind of was just doing what she wanted, and my sense was I didn't have any top cover to hold her accountable, and that if I were to write something down instead of just verbally talking with her or [the Deputy Department Head] verbally talking with her, that that would be used against us as retaliation. (Exh. 4)

The Deputy Department Head similarly told DHS OIG that he thought he talked informally with Complainant, but did not document any issues. (Exh. 2)

The Department Head described an environment at the Academy where performance issues are not documented. There was another department employee who the Department Head believed was a poor performer whose performance he did not document, even informally, because it "would be fodder for a union grievance." According to the Department Head, he did not document problem employees because of advice from Academy Official1 that the Academy was unlike the rest of the U.S. Coast Guard. (Exh. 4)

The strength of the reasons given is further weakened by the fact that the Deputy Department Head sent the Department Head at least four versions of the OER, with the marks varying widely in each version. The Deputy Department Head's original submission included several marks of four and five, then a later version included marks of only sixes and sevens. The final version contained three marks of five. Although the Department Head



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explained that Academy Official1 had put pressure on him to keep the marks high, there is no record of how or why the marks changed with each version, with the exception of the mark for Evaluations.

After the OER had been submitted to the Associate Dean for review, the Associate Dean noted to the Department Head that very few officers who are not formal supervisors are getting marks of six in Evaluations. Because Complainant was not a formal supervisor, this information from the Associate Dean provides support for lowering the previously submitted mark of six in Evaluations to five. Although this statement may have been true generally for officers at the Academy, however, this statement by the Associate Dean is inaccurate as to [REDACTED] Department officers, as every other O-3 and O-4 received higher than a five for Evaluations in the 2015-2016 OER cycle.

In sum, the evidence in the record shows that the strength of the reasons provided for the OER marks is undercut by the lack of documentation of any performance issues and widely varying marks given in the drafts being sent by the Deputy Department Head to the Department Head, with the exception of the mark of five in Evaluations. As discussed below, however, even the rationale for the Evaluations mark is undercut by the analysis of similarly situated officers.

b) Motive to Retaliate

The evidence in the record shows that the Deputy Department Head and Department Head both had motive to retaliate against Complainant for her March 2016 Harassment Complaint. Both individuals believed that the Complainant was alleging that they harassed and discriminated against her based on race, gender, and other bases. Complainant also had alleged that the Department Head discriminated against her as part of her July 2015 military EO allegations. (Exhs. 2, 4)

In particular, the Deputy Department Head's initial thought after learning of the March 2016 Harassment Complaint — to demand that Complainant apologize, then resign, for filing the complaint — indicates strong animus against Complainant for filing the complaint.

The Department Head also expressed annoyance at the March 2016 Harassment Complaint and EO Complaint #1 from July 2015. In May 2016 notes written up in response to Investigator2's informal opinions about the relationship between Complainant and the Department Head, the Department Head implied that he believed Complainant used discrimination complaints to get what she otherwise could not. (Exh. 30) In response to the recommendation



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for an “[h]onest, person-to-person exchange regarding perceived performance, issues, sleights and anything else,” the Department Head wrote: “Ok, but no EEO category-based allegations from [Complainant] if she doesn’t like what she hears.” (Exh. 3)

DHS OIG did not find any evidence that the Associate Dean had a motive to retaliate in signing off on the OER, which is more of a clerical task, or when he informed the Department Head that few officers who were not supervisors were getting a six in the Evaluations category.

c) Similarly Situated Individuals

Evidence in the record supports the conclusion that Complainant was given lower OER marks in 2016 compared to similarly situated O-3 and O-4 officers in the [REDACTED] Department who did not file complaints.

First, Complainant received higher marks the previous year, when the Department Head was both the Supervisor and Reporting Officer. He provided marks of six or seven in all categories. Complainant also received higher marks for the period ending in 2017, when the Department Head was not involved in assigning marks. It was only in the OER in between, which was completed a few months after Complainant filed the March 2016 Harassment Complaint, that Complainant received multiple marks of five. In that OER, the Department Head was the Reporting Officer and had significant involvement in the Deputy Department Head’s marks. (Exh. 44)

Second, DHS OIG reviewed the OER marks of all [REDACTED] Department O-3 and O-4 officers for the periods ending in 2015, 2016, and 2017, and found that no other officer had received a single mark of five in any category, including in Evaluations, even though only the Deputy Department Head was a formal supervisor. (Exh. 44) Complainant taught the same amount of classes or more compared to the rest of the staff in the [REDACTED] Department, and had collateral duties as significant as the other O-3 and O-4 officers, who had not filed complaints. (Exh. 39)

Thus, in sum, the totality of the evidence indicates that Complainant would have received marks of at least six had she not made her July 2015 military EO and March 2016 allegations. DHS OIG substantiates Complainant’s allegations regarding her OER.



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ii. Analysis of the Denial of a Transfer

a) Strength of the Reasons for Denial of a Transfer

Academy Official1 and Academy Official3 provided non-retaliatory reasons for denying the Complainant's transfer outside of the [REDACTED] Department, and these non-retaliatory reasons are generally supported in the record.

Academy Official1 told DHS OIG that a move to the [REDACTED] Department was a non-starter, because the [REDACTED] Department was very short-staffed, and because a unilateral, permanent transfer was unheard of. (Exh. 5)

Academy Official3 told DHS OIG: "At the end of the day, there was a collective feeling that she is a Permanent Commissioned Teaching Staff with [REDACTED], hired to do [REDACTED] work, and that that's what we needed her to do. That's the duty at hand, so to speak." (Exh. 7)

Academy Official4 also told DHS OIG that Academy Official1 had concerns that Complainant's background was not aligned with the [REDACTED] Department, and was concerned about her promotion ability if she taught lower level [REDACTED] courses. (Exh. 12)

DHS OIG finds the rationale of Academy Official1, Academy Official3, and Academy Official4 to be compelling business reasons for their decision not to move Complainant.

In contrast, Academy Official2 stated to DHS OIG that he did not support Complainant's transfer because all of her allegations were not substantiated, and to move Complainant simply because she didn't like her boss would set a bad precedent. (Exh. 6) This reasoning is not compelling, because no investigator found Complainant's allegations unsubstantiated during Academy Official2's time at the Academy. In addition, Academy Official2's contention that Complainant wanted a transfer because she merely disliked her boss is not supported by the record. Nonetheless, DHS OIG found that Academy Official2 sincerely — though erroneously — believed that all of Complainant's allegations were not substantiated at that point, thus providing some support for Academy Official2's opposition to transferring Complainant.

b) Motive to Retaliate

Academy Official1 and Academy Official3 had some motive to retaliate against Complainant after she spoke with the Deputy Secretary for DHS and alleged discrimination, harassment, and bullying. Academy Official3 seemed



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particularly frustrated that she went so far up the chain of command, and characterized her conversation with the Deputy Secretary for DHS as meeting with the Deputy Secretary “under false pretenses.” (Exh. 7)

With respect to Academy Official2, the evidence on balance does not indicate retaliatory motive in his June 2016 denial of Complainant’s request to be moved out of the ██████████ Department just prior to Academy Official2 leaving the Academy. At that point, Academy Official2 was not the subject of any complaints. At the same time, though, Complainant and another witness reported that Academy Official2 did exhibit animosity towards the Complainant during a May 2016 meeting. (Exhs. 1, 10) Additionally, subsequent emails suggest that Academy Official2 and Academy Official3 thought negatively of Complainant. In an email to Academy Official3 on July 12, 2017, for example, Academy Official2 sarcastically asked if Academy Official3 had asked “our favorite instructor” — meaning Complainant — to complete a leadership feedback survey. However, these emails were after Complainant named Academy Official2 and Academy Official3 in complaints. (Exhs. 6, 47) Ultimately, DHS OIG could not establish any direct link between Complainant’s protected disclosures and Academy Official2’s negative views of Complainant.

DHS OIG found no evidence indicating that Academy Official4, who was not named in any of the complaints, had any animus against Complainant.

c) Similarly Situated Individuals

Academy Official1 told DHS OIG that he believed that there had been no permanent move of an officer to another department while he has been at the Academy. Individuals have been transferred between departments, but through swaps of positions, and usually when one of the positions was vacant. There was no vacancy in the ██████████ Department at the time. (Exh. 5) The evidence provided by the U.S. Coast Guard corroborates Academy Official1’s contention that permanent moves have been done, but only as a swap of positions. (Exh. 50)

In sum, clear and convincing evidence indicates that Academy Official1, Academy Official2, and Academy Official3 would have denied Complainant’s requests to be moved regardless of whether she had made a protected communication.



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VI. ANALYSIS – ALLEGED FAILURE OF SUPERIORS TO RESPOND TO RETALIATION

In December 2016, Congress amended the MWPA to make “the failure of a superior to respond to any retaliatory action or harassment (of which the superior had actual knowledge) taken by one or more subordinates against a member” a prohibited personnel action.²⁰

DHS OIG reviewed the actions taken in 2017 by HQ Admiral1 and HQ Admiral2 in response to Investigator3’s investigation.²¹

Whether either admiral’s actions constituted a failure to respond to retaliation under the MWPA appears to be an issue of first impression for DHS. DHS OIG found no legislative history that added insight into how to interpret this provision, nor any guidance issued by the Department of Defense. The closest analogue to the failure to respond provision is found in Title IX case law, where a recipient of Title IX funding can be held liable for a “failure to adequately respond” to teacher-student or student-student sexual harassment of which the funding recipient had “actual knowledge.”²² For an action to be considered a failure to adequately respond under Title IX, the funding recipient’s response “must amount to deliberate indifference to discrimination.”²³ Specifically, the response will only be considered a failure if it “was clearly unreasonable in light of the known circumstances.”²⁴

DHS OIG adopts this framework in analyzing whether either admiral failed to respond to retaliation under the MWPA. Thus, in order to substantiate an allegation of a failure to respond to retaliation, a preponderance of the evidence²⁵ must show that:

²⁰ National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 531, 130 Stat. 2000, 2118 (2016).

²¹ Nothing in the National Defense Authorization Act for Fiscal Year 2017 suggests that Congress intended the failure to respond provision to have retroactive effect. Therefore, the actions taken by Academy leadership in 2016 are not analyzed here.

²² See *Davis v. Monroe County Bd. Of Educ.*, 526 U.S. 629, 649 (1999); *Gebser v. Lago Vista Independent Sch. Dist.*, 524 U.S. 274, 290 (1998).

²³ *Gebser*, 524 U.S. at 290.

²⁴ *Davis*, 526 U.S. at 649.

²⁵ Although the Supreme Court was not explicit as to the quantum of proof necessary to establish a failure to respond under Title IX, trials courts use preponderance of the evidence. See, e.g., *Williams ex rel. Hart v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 363 (6th Cir. 2005); *Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355, 360 (3rd Cir. 2005).



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- (1) A superior had actual knowledge of any retaliatory action or harassment against a member taken by one of the superior's subordinates; and,
- (2) The superior's response was clearly unreasonable in light of the known circumstances.²⁶

While a preponderance of the evidence demonstrates that both HQ Admiral1 and HQ Admiral2 had actual knowledge of retaliatory actions and harassment, neither admiral's response was clearly unreasonable. Thus, DHS OIG does not substantiate the claims of their failure to respond.

A. Both Admirals Had Actual Knowledge of Retaliation

Both HQ Admiral1 and HQ Admiral2 reviewed Investigator3's memorandum, which identified a number of harassing behaviors, most of which occurred after Complainant's EO Complaint #1 and March 2016 Harassment Complaint. Although Investigator3 "found no evidence of overt or blatant instances of either harassment or bullying based on [Complainant's protected classes] or retaliation," "evidence corroborates her being subjected to harassment and bullying in the form of insults or put downs, psychological harassment, [and] belittling or degrading comments that may be harmful to her career or reputation." (Exh. 39)

Although the language of Investigator3's memorandum is not completely unequivocal, on balance, the memorandum provided actual knowledge of retaliation, particularly where it found that a review of Complainant's accomplishments during the 2015-2016 OER period "lends itself to the conclusion that the marks were lowered based on outside influences, versus unbiased opinion and identifiable behaviors (the OER followed the EO complaint filed by the officer against the supervisor)." (Exh. 39)

B. The Responses of the Admirals Were Not Clearly Unreasonable

i. HQ Admiral1

HQ Admiral1 considered two orders to the Academy in response to Investigator3's findings: one that would direct Complainant's transfer, and one that would direct Academy Official4 to negotiate a resolution agreement and encourage the transfer of Complainant as part of that agreement. HQ Admiral1

²⁶ Considerations specific to whistleblower protection could support applying a standard lower than "clearly unreasonable." However, the language added to the MWPA is almost identical to language used by the Supreme Court in *Gebser* and *Davis*, which preceded the addition of the failure to respond provision to the MWPA.



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issued a memorandum directing the latter, but with an added line (suggested by legal staff) that the agreement must resolve all complaints pending against the U.S. Coast Guard. (Exhs. 14, 40-41)

Specifically, HQ Admiral1 stated that he ultimately did not immediately move Complainant out of the situation “because I wanted the Coast Guard Academy to resolve the situation” and because “I thought there was room for the Academy to resolve the issue.” Although HQ Admiral1 thought it would “have made sense for the Academy” to immediately transfer Complainant, he believed that Academy Official3 deserved an opportunity to take care of the issue. (Exh. 14)

Given that Complainant had been making allegations about her work environment to Academy leadership that had gone unresolved since 2015, HQ Admiral1’s rationale for delegating the decision back to the Academy is weak, but the decision is not clearly unreasonable.

HQ Admiral1’s direction to enter into settlement negotiations was to Academy Official4, who Complainant had not alleged was involved in the harassment or the Academy’s initial responses to her complaints. In fact, Academy Official4 was the one who received Complainant’s January 2017 allegations and worked with HQ Admiral1 to have an investigation be convened. HQ Admiral1 had a basis to believe that Academy Official4 would adequately resolve the situation.

Despite the risk that HQ Admiral1’s direction would leave Complainant in a hostile work environment, reasonable minds could differ on whether this approach was appropriate. Thus, based on a preponderance of the evidence, HQ Admiral1’s response to Investigator3’s memo was not clearly unreasonable in light of the known circumstances.

ii. HQ Admiral2

A preponderance of the evidence similarly demonstrates that HQ Admiral2’s response was not clearly unreasonable.

Although HQ Admiral2 did not disturb the direction given to the Academy by HQ Admiral1, HQ Admiral2 went further than HQ Admiral1 and made efforts to find a representative for Complainant to assist her in the settlement negotiations. (Exh. 41) In an email to a potential representative, the HQ Staff Judge Advocate wrote that HQ Admiral2 did not want someone “beholden” to the Academy. (Exh. 41) HQ Admiral2 told DHS OIG that he meant he wanted someone “who would guide or give [Complainant] advice that did not necessarily have conflicting allegiances.” (Exh. 15)



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Ultimately, by that point, however, Complainant had retained private counsel. Within a few days of that counsel declining to enter into mediation, Academy Official4 temporarily moved Complainant to the [REDACTED] Department, with HQ Admiral2's knowledge. (Exh. 41)

In sum, because neither admiral acted clearly unreasonably in response to Investigator3's investigation based on a preponderance of the evidence, DHS OIG does not substantiate the allegations that they failed to respond to retaliation in violation of the MWPA.

VII. ADDITIONAL ISSUES

A. Handling of Complainant's Complaints by Academy Official2 and Academy Official1

Evidence in the record demonstrates that there were issues with the handling of the Complainant's complaints by Academy Official2 and Academy Official1. These individuals were unable to provide persuasive reasons for why, after Investigator1 recommended a full administrative investigation into Complainant's allegations conducted by someone with EEO or civil rights credentials, no such investigation was convened.

The subsequent climate and culture investigation conducted by Investigator2, who had no EEO or civil rights experience, was not an equal substitute for an investigation into Complainant's specific allegations. Moreover, the manner in which the investigation was conducted raises questions about the depth and objectivity of the fact-finding. For instance, interviews were scheduled for only 20 minutes, only asked general yes or no questions, and were conducted in the [REDACTED] Department space in coordination with the Department Head. (Exhs. 9, 29)

Additionally, Complainant witnessed the Department Head in the hallway pacing or lingering near the breakroom at the time of her interview, felt intimidated by it, and reported the issue. (Exhs. 1, 5) The Department Head told DHS OIG that he did not see anyone being interviewed by Investigator2 in the [REDACTED] Department space nor knew where others were being interviewed. (Exh. 4) This statement is contradicted by evidence provided by Academy Official1, however, who told DHS OIG that when he asked the Department Head about Complainant's concern, the Department Head explained that he "was just trying to get folks organized to see" Investigator2. (Exh. 5)



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Further, Academy Official2's representation to Complainant that the allegations investigated by Investigator1 were unsubstantiated was incomplete and potentially misleading. Of the two third-party witnesses interviewed by Investigator1, one specifically said that Complainant was treated differently, and received more flak over the painting of a wall without a reason why. This testimony is evidence that supported Complainant's basis to believe that she had been treated differently. As the only [REDACTED], and as the only member who she observed being treated this way, Complainant reasonably believed her treatment was at least partly because of her race and gender. (Exh. 39) Yet by telling Complainant that her allegations were unsubstantiated, Academy Official2 led Complainant to believe that the investigation uncovered no evidence to support her allegations. As Investigator3 told DHS OIG: "If I were [Complainant] and heard someone say it was unsubstantiated, that means you're saying nothing I said carried any weight." (Exh. 13)

In addition, by announcing to the [REDACTED] Department staff that a complaint had been filed that was unsubstantiated, but that a climate and culture investigation would be convened, Academy Official2 also likely exacerbated negative feelings by some in the department against Complainant. The Deputy Department Head and the Assistant Department Head, who had not seen Investigator1's specific findings and recommendations, expressed exasperation that Complainant continued to file complaints in the face of what they believed were investigators not finding her allegations substantiated. (Exhs. 2-3)

Similarly, Academy Official2's email to Complainant and her supervisors erroneously stated that "three inquiries/investigations conducted by [Academy Official1], [Investigator1], and [Investigator2]" resulted in command determining that she had not been subject to substantiated harassment. (Exh. 31) As discussed, only Investigator1 conducted an investigation into Complainant's specific allegations of harassment, and he concluded that he could not make a determination about whether or not harassment had occurred.

There is no evidence to suggest that Academy Official1 or Academy Official3, who both received the email, ever corrected Academy Official2. In fact, that line from the email was eventually incorporated into a March 2017 timeline prepared by Academy Official1 and Academy Official4 for Vice Admiral Sandra Stosz and HQ Admiral1. Academy Official1 did not correct or clarify the statement in the timeline. (Exh. 50)



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Finally, evidence in the record shows that Academy Official2 demonstrated a lack of understanding of what constitutes discrimination, questioning, for example, how a non-endorsement of an award could be discriminatory. (Exh. 6) Further, Academy Official2 did not appreciate the distinction between the EO complaint process and the USCG's harassment complaint process, which are governed by separate procedures and standards. (Exh. 6). The U.S. Coast Guard Civil Rights Manual makes clear that "filing a harassment complaint does not replace, substitute, or satisfy the separate requirements for filing a Discrimination Complaint," but Academy Official2 erroneously believed that a harassment administrative investigation was part of the EO complaint process. (Exhs. 6, 45) Supervisors have differing responsibilities depending on the type of complaint filed or allegation made, and conflating the complaint processes increases the risk for error.

DHS OIG recommends that the Secretary require additional training for all U.S. Coast Guard supervisors and managers on the agency's discrimination, harassment, and bullying policies. This supplemental training should make clear the differences between these policies, including the standards and processes used for reaching an outcome for each type of complaint. The training should cover the need for both actual and apparent impartiality for an administrative investigation convened in response to a complaint.

B. Discussion of Complainant's Ongoing Complaints by Academy Official2 with HQ Admiral2, Academy Official1, and Academy Official3

Section C.1.d. of chapter two of the U.S. Coast Guard Civil Rights Manual states that "reports of harassment will be treated as confidential to the extent possible and consistent with good order and discipline," and "All Hands are required to ensure protection of confidentiality to the extent possible." (Exh. 45) Upon notification of a complaint of prohibited harassment, commanders of Coast Guard Units are required to "respect the confidentiality of individuals reporting harassment or providing information relating to harassment to the extent permitted by law and consistent with good order and discipline."

DHS OIG found that Academy Official2 continued to periodically discuss Complainant and her complaints with Academy Official1, Academy Official3, and HQ Admiral2 after he left the Academy in the summer of 2016. These contacts were after Academy Official1, Academy Official2, and Academy Official3 were named in Complainant's January 2017 EO, harassment, and bullying complaints, and while HQ Admiral2 was the [REDACTED] handling those complaints. (Exhs. 5, 6, 7, 15)



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None of the individuals involved could describe with specificity the conversations Academy Official2 had with the others. However, email evidence indicates that Academy Official2 had multiple conversations with individuals in the summer of 2017 regarding Complainant. For instance, on July 11, 2017, at 4:19 PM, Academy Official2 emailed Academy Official3 that “I heard from [the Deputy Judge Advocate General] that the [Complainant’s administrative investigation] is done and from [HQ Admiral2] that he made a decision on the EEO/CR. Do you have any visibility? Just wondering if this is (possibly!?!?) finally settled.” (Exh. 26) At 4:23 PM on the same day, Academy Official3 responded with a separate message, with the subject “YOUR EMAIL,” stating only, “Happy to discuss on the phone if you’d like. Issue nowhere near settled.” (Exh. 26)

When DHS OIG asked Academy Official3 why he responded to Academy Official2’s email in a separate email that did not specifically reference Academy Official2’s email, Academy Official3 stated, “I don’t know—I don’t have a good answer for you.” Academy Official3 acknowledged that he did not typically respond to an email with a separate email. When asked if the Academy Official3’s subsequent email and his suggestion that they talk on the phone were an attempt not to create a paper trail, Academy Official3 stated: “Uh, well, I will say that I like to be smart about emails, so, I mean—but, I wouldn’t say it’s—I don’t know why I did what I did, but I did. But I am, I am, I mean, on a day-to-day basis, I am sensitive to what it is I’m doing on emails.” (Exh. 6)

Academy Official3 could not recall the specifics of any conversation, but believed that Academy Official2 was asking about the status of the process and when the investigation of the complaint would be finished and settled. (Exh. 7) The next day, on July 12, 2017, Academy Official2 in an email thanked Academy Official3 for his conversation the day prior and stated that he “[s]aw [HQ Admiral2] in the gym this morning. Like all of us, he is frustrated.” (Exh. 26) Academy Official2 stressed to DHS OIG that although he and Academy Official3 did not discuss details of the complaint, there was also no requirement that prevented him and Academy Official3 from discussing Complainant or the details of her ongoing EO complaint. (Exh. 6)

Academy Official2 acknowledged: 1) that he spoke with HQ Admiral2 around this time; 2) that HQ Admiral2 would have told him about the decision to move Complainant to the ██████████ Department; and 3) that Academy Official2 told HQ Admiral2 that he disagreed with the decision. (Exh. 6) HQ Admiral2 told DHS OIG that he often speaks with Academy Official2 in the gym but that the issue of the Complainant did not come up very often. He also stated that he would not be surprised if Academy Official2 had asked if they got things figured out with respect to Complainant. HQ Admiral2 did not recall specific details,



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and acknowledged that “it’s possible” that Academy Official2 may have also expressed negative opinions about Complainant, but he did not recall specifically. (Exh. 15)

DHS OIG finds that Academy Official2’s discussion of issues relating to Complainant’s harassment complaint investigated by Investigator3 and the ongoing EO complaint, including his unsolicited opinion to HQ Admiral2 on what not to do for Complainant, likely violated the U.S. Coast Guard Civil Rights Manual’s requirement to respect confidentiality of an individual reporting harassment. Academy Official2 had no need to be asking these individuals about the status of Complainant’s complaints.

Even if Academy Official2 did not specifically violate a U.S. Coast Guard policy, the evidence shows that Academy Official2 and Academy Official3’s actions unnecessarily created the appearance that they discussed details of the ongoing EO complaint, and did so intentionally in a way that would avoid the discussion being documented. Notably, their phone call occurred just a few weeks prior to both individuals submitting affidavits in Complainant’s EO case. Academy Official2’s sarcastic reference to Complainant as “our favorite instructor” in an email to Academy Official3 following their phone call further demonstrated Academy Official2’s lack of tact.

In addition, given that Academy Official2 had not seen the findings of Investigator3 and had no role in issues relating to Complainant after the summer of 2016, Academy Official2 showed poor judgment in discussing her with HQ Admiral2 and weighing in on the decision to move her.

According to the U.S. Coast Guard Civil Rights Manual, specialized civil rights and EO training is provided to newly selected flag, senior executive, and Command Master Chief corps through the Senior Executive Leadership Equal Opportunity Seminar (SELEOS). (Exh. 45) DHS OIG recommends that the Secretary require SELEOS or analogous training to include a unit on discretion in communicating about ongoing complaints.

C. Lack of Written Bases for Harassment and Bullying Determinations

Section 3.C. of Commandant Instruction Manual M1600.2, Discipline and Conduct requires an outcome memorandum following a bullying investigation to include a description of substantiated acts of bullying. It does not, however, require the reasoning for a commanding officer’s determination that acts of bullying were not substantiated. (Exh. 51)



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Similarly, for harassment complaints, the U.S. Coast Guard Civil Rights Manual requires that commanders report their “findings and outcomes” to the Director of the Civil Rights Directorate, but does not specify what, if any, level of detail is required for the reasoning of the findings and outcomes. (Exh. 45) HQ Admiral1’s findings and outcome memo, for example, noted that he found Complainant’s allegations unsubstantiated, but did not include or address Investigator3’s seemingly contrary findings of insults and belittling comments made against Complainant. (Exh. 41)

Investigator3 told DHS OIG that although her findings were “a little bit wishy washy,” she was surprised that the allegations were found to be unsubstantiated, and that it would be inaccurate to characterize her investigation as finding that Complainant’s allegations were not substantiated. HQ Admiral1 never indicated to Investigator3 that he would not substantiate the allegations. (Exh. 13)

A commanding officer need not accept the findings of an investigator, but there should be some written record explaining the basis for a commanding officer’s conclusion, particularly where it appears inconsistent with an investigator’s findings. To ensure consistency in how the U.S. Coast Guard applies its harassment and bullying policies, DHS OIG recommends that the Secretary direct the U.S. Coast Guard to require that commanding officers document in writing the reasons for their determinations in harassment and bullying cases, both when substantiating and when unsubstantiating allegations.

D. Incorrect Whistleblower Protection Information in the U.S. Coast Guard Civil Rights Manual

During the course of this investigation, DHS OIG discovered that Section C.1.b of chapter two of the U.S. Coast Guard Civil Rights Manual states that individuals who believe they may have been victims of whistleblower retaliation may file a complaint with the U.S. Office of Special Counsel (OSC), but makes no mention of the fact that OSC does not have jurisdiction over whistleblower retaliation complaints of military members. Only DHS OIG can investigate allegations of whistleblower retaliation of U.S. Coast Guard military members, pursuant to the MWPA. DHS OIG recommends that the manual be modified to add this clarification.

VIII. CONCLUSION

DHS OIG substantiates Complainant’s allegation that she received low marks on her OER for the period ending May 31, 2016, in retaliation for her



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whistleblowing activity. DHS OIG recommends the corrective action below to remedy the situation.

Although a preponderance of the evidence also suggested that Complainant's protected communications were a contributing factor in the denial of her transfer out of the [REDACTED] Department, clear and convincing evidence indicated that Academy Official1, Academy Official2, and Academy Official3 would have taken the same actions absent the protected communications. Accordingly, DHS OIG did not substantiate whistleblower retaliation with respect to this allegation.

DHS OIG does not substantiate the allegations that HQ Admiral1 and HQ Admiral2 failed to respond to retaliation because a preponderance of the evidence indicates their responses were not clearly unreasonable.

IX. RECOMMENDATIONS

We recommend that the Secretary take the following actions:

- (1) Order such action as is necessary to correct Complainant's Officer Evaluation Report for the period of June 1, 2015, to May 31, 2016, by correcting marks of five to at least marks of six;
- (2) Direct the Commandant of the U.S. Coast Guard to require that commanders document in writing the reasons for their findings and outcomes in response to bullying and harassment complaints;
- (3) Require supplemental training for U.S. Coast Guard supervisors and managers on the agency's discrimination, harassment, and bullying policies, including on how to respond to receipt of an allegation and the importance in exercising discretion in communicating about ongoing complaints; and
- (4) Direct that the U.S. Coast Guard Civil Rights Manual, COMDTINST M5350.4C, be modified to clarify that military members who believe they were subject to whistleblower retaliation should file a complaint with DHS OIG, not the U.S. Office of Special Counsel.



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Appendix A - Changes in HQ Admiral1's Action Memo to the Academy

Version	Text
Proposed Versions #1 and #2	The investigation highlights honest mistakes that were made in communicating expectations and performance feedback to [Complainant]. . . . However, poor communication over an extended period of time aggravated tensions and created an uncomfortable climate that is unlikely to get better. . . . However, I do recommend that you use this investigation to improve communication and respect up and down the chain of command, with the goal of creating a positive and productive work environment for your staff and the future Coast Guard leaders they are entrusted to lead.
Final Version (with changes)	The investigation highlights honest mistakes that were made in communicating expectations and performance feedback to between [Complainant] and her supervisors. . . . However, poor communication over an extended period of time aggravated tensions and created an uncomfortable climate that is unlikely to get better. . . . However, I do recommend that you use this investigation to improve communication and respect up and down the chain of command, with the goal of creating a positive and productive work environment for your staff and the future Coast Guard leaders they are entrusted to lead.
Proposed Version #1	In that regard, I am directing you to transfer [Complainant] to the [REDACTED] Department. The Academy and [Complainant] will be best served if you provide her a fresh start with a supportive chain of command.
Proposed Version #2	In that regard, [Academy Official4] must negotiate a resolution agreement with [Complainant] to set her and the Academy on a better path. As part of that agreement, I encourage you to transfer [Complainant] to the [REDACTED] Department.
Final Version (with changes from Proposed Version #2)	In that regard, [Academy Official4] must negotiate a resolution agreement enter into settlement negotiations with [Complainant], in order to set her and the Academy on a better path. As part of that the terms of the agreement, I encourage you to consider transferring [Complainant] to the [REDACTED] Department. Any such agreement, though, must resolve and dismiss all outstanding complaints filed by [Complainant], formal or informal, which are currently pending against the Coast Guard.



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Appendix B - EXHIBITS

NUMBER	DESCRIPTION
1	Memorandum of Activity (MOA), Interview of Complainant, October 20, 2017.
2	MOA, Interview of the Deputy Department Head, June 22, 2018.
3	MOA, Interview of the Assistant Department Head, May 15, 2018.
4	MOA, Interview of the Department Head, May 17, 2018.
5	MOA, Interview of Academy Official1, May 15, 2018.
6	MOA, Interview of Academy Official2, June 14, 2018
7	MOA, Interview of Academy Official3, May 16, 2018.
8	MOA, Interview of Investigator1, February 2, 2018.
9	MOA, Interview of Investigator2, February 1, 2018.
10	MOA, Interview of [REDACTED], January 31, 2018.
11	MOA, Interview of Associate Dean, May 15, 2018.
12	MOA, Interview of Academy Official4, May 23, 2018.
13	MOA, Interview of Investigator3, May 30, 2018.
14	MOA, Interview of HQ Admiral1, June 5, 2018.
15	MOA, Interview of HQ Admiral2, June 7, 2018.
16	Resolution Agreement, signed September 3, 2015
17	Letter Incident Report from Investigator1 to Academy Official1, April 15, 2016
18	Email to Academy Official1, Report of Harassment-Hostile Work Environment, March 23, 2016
19	Email from Complainant, March 25, 2016
20	Memorandum from Academy Official1 to Civil Rights Directorate, "Findings and Outcome of Report of Harassment," April 21, 2016
21	Investigation of Climate and Culture within the Coast Guard Academy [REDACTED] Department, from Investigator2 to Academy Official2, May 24, 2016
22	Statement, Opinions, and Comments of Investigator2, May 18, 2016
23	Email from Deputy Department Head, March 24, 2016
24	Appointment Memorandum from Academy Official2 to Investigator2, April 26, 2016
25	Email from Department Head, May 2, 2016
26	Emails between Academy Official2 and Academy Official3, July 11-12, 2017
27	Email from Academy Official2 to Investigator2, May 3, 2016
28	Email from Academy Official2 to Complainant, May 5, 2016
29	Emails regarding department interviews with Investigator2, May 11-12, 2016



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30	Department Head's Statement Discussion, May 30, 2016
31	Email from Academy Official2 to Complainant, May 31, 2016
32	Email from Academy Official2 to Complainant, June 1, 2016
33	Email from Academy Official3 to Academy Official1, June 24, 2016
34	Emails Relating to Cyber Workshop, Jan. 25, 2016 to Feb. 3, 2016
35	Email from Academy Official2, May 29, 2016
36	Draft email from Academy Official3, last edited March 7, 2018
37	Email from Academy Official2, January 30, 2017
38	Email from HQ Admiral1, February 7, 2017
39	Memorandum from Investigator3, May 2, 2017
40	Email from HQ Admiral1, May 12, 2017
41	MOA, HQ Admiral1 Investigation Email Review, January 23, 2018
42	MOA, 2016 OER Records Review, January 3, 2018
43	MOA, Additional 2016 OER Records Review, April 20, 2018
44	██████████ Department 2015-2017 OERs for O-3 and O-4 officers
45	COMDTINST M5350.4C, "Coast Guard Civil Rights Manual" (May 2010)
46	MOA, Receipt of FOIA Documents, June 26, 2018
47	Email from Academy Official2, July 19, 2017
48	U.S. Coast Guard Final Agency Decision, Feb. 22, 2018, and related Report of Investigation
49	Decision on Request for Reconsideration, July 3, 2018
50	Emails regarding Complainant Timeline, March 23 and 27, 2017
51	Documents relating to transfers at the Academy
52	COMDTINST M1600.2, "Discipline and Conduct" (September 2011)